NO. 57142-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDRE BONDS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Judge James R. Orlando

No. 08-1-05850-8

BRIEF OF RESPONDENT

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I. INTRODUCTION

A jury found the defendant, Andre Bonds, guilty of first-degree assault. The court calculated his offender score in 2009 as 11, based on a criminal history that included a conviction for unlawful possession of a controlled substance and a conviction for conspiracy to deliver a controlled substance. Bonds was sentenced to 276 months. A decade later, pursuant to *Blake*,[1] the court entered an order correcting judgment in 2022 in which Bond's offender score remained 11 following the vacation of his simple possession conviction due to a post-sentencing conviction. The court, nonetheless, imposed a new sentence at the bottom of the reaffirmed standard range.

For the first time on appeal, Bonds claims that his post-*Blake* offender score should be 10, as his prior 2000 conviction for conspiracy to deliver a controlled substance should have been omitted. The inclusion of this conviction, however, was proper as it is facially valid. But even if the court improperly included

[1] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

the prior 2000 conviction for conspiracy to deliver in the offender score, the error was harmless because its removal does not change the standard range, and the defendant received a sentence at the bottom of the standard range. Accordingly, this court should deny Bonds' request for a third sentencing hearing.

II. RESTATEMENT OF THE ISSUES

A. Whether the court properly included in the offender score a facially valid prior conviction that was supported by a guilty plea that was voluntary when entered?

B. Whether the inclusion of the defendant's prior conviction for conspiracy to deliver drugs in the offender score, if in error, was harmless where its removal would not change the standard sentencing range, and the defendant received a new sentence at the bottom of the standard range?

III. STATEMENT OF THE CASE

In 2008, Andre Bonds intentionally assaulted Timothy Pitts with a firearm or deadly weapon and rendered him permanently disabled. CP 2, 5, 46-47, RP (2009) 25.[2] At the time

[2] The verbatim report of proceedings is comprised of two volumes, both of which start with page one, contrary to RAP 9.2(f)(2)(A). For the reader's convenience, the State will cite to the volumes by the year the hearing took place, as "RP (2009)" and "RP (2022)."

of the assault, Bonds had already amassed a significant number of adult convictions, including prior assaults. *See* CP 6. The case proceeded to a jury trial. CP 5; RP (2009) 24. The jury found Bonds guilty of assault in the first degree on September 15, 2009. *Id*.

On December 4, 2009, at Bonds' first sentencing hearing, the court reviewed Bonds prior criminal history, which included nine adult convictions, and calculated an offender score of 11. CP 6, 37; RP (2009) 10. This yielded a sentencing range of 240 to 318 months. CP 6. Bonds was sentenced to 276 months. CP 9; RP (2009) 25. Bonds' conviction and sentence became final when the mandate was issued from his direct appeal on June 6, 2012. CP 217; RCW 10.73.090(3)(b).

Bonds' offender score of 11 included a prior adult conviction for unlawful possession of a controlled substance in violation of RCW 69.50.401(d). CP 6, 98. It also included a prior

conviction for conspiracy to deliver a controlled substance.[3] CP 6. This conviction was based upon a guilty plea in a case in which Bonds was initially charged with unlawful possession of a controlled substance. CP 149-177.

In February of 2021, the Washington Supreme Court issued its decision in *Blake*, which held that the statute that criminalized simple possession of drugs, RCW 69.50.401(d), was unconstitutional. *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). The holding in *Blake* rendered all simple possession convictions void, whether vacated or not. *Blake* also impacted offender scores for non-simple possession convictions, as the facially invalid and void convictions for simple possession must be omitted from the score. *See generally State v. Ammons*, 105 Wn.2d 175, 188-89, 713 P.2d 719, *amended*, 105 Wn.2d 175, 718 P.2d 796 (1986).

[3] To enhance readability, the title of this crime has been shortened throughout the rest of this brief to "conspiracy to deliver."

Nearly ten years after his sentence became final, Bonds sought resentencing pursuant to *Blake*. Bonds asked only that he be resentenced without his simple possession convictions being included in the offender score. CP 18-20; RP (2022) 6-10. Bonds did not challenge the inclusion of any of his other crimes in his offender score. *Id.* Bonds agreed with the State, both in writing and orally, that his post-*Blake* offender score remained the same as his original offender score.[4] *See* RP (2022)7; CP 28-29. Bonds sentencing range also remained the same in 2022 as in 2009—240 to 318 months. CP 29.[5]

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[4] This is because the removal of his unlawful possession of a controlled substance convictions were offset by points arising from a conviction entered after Bonds' 2009 sentencing. RP (2022) 6-7. *See, e.g.*, *State v. Worl*, 91 Wn. App. 88, 93, 955 P.2d 814 (1998) (on resentencing after remand, court properly included conviction for offense committed after offense for which defendant was being sentenced).

[5] This fact should have led the trial court to forward Bonds' request for *Blake* relief to this court for handling as personal restraint petition (PRP) pursuant to CrR 7.8(c)(2), as the judgment and sentence remained facially valid and subject to RCW 10.73.090's one year time bar. *See, e.g., State v. Kelly*, __ Wn. App. 2d ___, 526 P.3d 39, 45-46 (2023).

Both in a letter submitted prior to the hearing on Bonds' motion for resentencing and during the resentencing hearing itself, Bonds asked for a bottom of the standard range sentence. CP 18; RP (2022) 8-9. Pointing to his prison record, Bonds, in his allocution, tendered a request for an exceptional sentence below the standard range. RP (2022) 14. The trial court rejected the request for a mitigated sentence but did reduce Bonds' original sentence by imposing a new one at the bottom of the standard range. RP (2022) 16-18; CP 29.

While the State argued that no change in sentence was warranted because the standard range remained unchanged, RP (2022) 5-6, it failed to alert the trial court that RCW 10.73.090 barred resentencing. This Court has stated, however, that RCW 10.73.090 is a mandatory rule that courts must follow even when the prosecution believes the statute is inapplicable. *In re Pers. Restraint of Young*, 21 Wn. App. 826, 830 n. 1, 508 P.3d 687 (2022).

The State is prohibited, in this case, from requesting affirmative relief due to its failure to file a timely notice of cross-appeal. RAP 2.4(a)(1). This Court may, nonetheless, apply RCW 10.73.090's time bar to this mater "if demanded by the necessities of the case." RAP 2.4(a)(2).

Bonds filed a timely notice of appeal from his newly reduced standard range sentence. CP 31.

IV. ARGUMENT

A. Bonds' Offender Score Was Properly Calculated

Bonds asserts the trial court's inclusion of his prior 2000 conviction for conspiracy to deliver when calculating his offender score was improper because the conviction is unconstitutional. His claim fails. Bonds' 2000 conviction for conspiracy to deliver was for a real and constitutionally valid crime that was not invalidated by *Blake.* His conviction for conspiracy to deliver is, moreover, facially valid. The Court, therefore, correctly included the conspiracy to deliver when it calculated his offender score. Bonds' request for a third sentencing hearing must be denied.

The offender score is the sum of points accrued for prior and current convictions. *See* RCW 9.94A.525. The Sentencing Reform Act (SRA) itself does not require the State to prove the constitutional validity of a prior conviction. *See* RCW

9.94A.500(1)[6]; *Ammons*, 105 Wn.2d at 187. The State is only required to prove the constitutional validity of a prior conviction when the prior conviction is an element of the crime. *See, e.g., State v. Summers*, 120 Wn.2d 801, 812, 846 P.2d 490 (1993); *Ammons*, 105 Wn.2d at 187.

A sentencing court acts without authority when it imposes a sentence based on a miscalculated offender score. *State v. Lowe*, 173 Wn. App. 390, 394-95, 293 P.3d 1287 (2013). Offender score calculations are reviewed de novo. *State v. Moeurn*, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010); *See also State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

1. Conspiracy to deliver a controlled substance is a real crime.

Bonds challenges the validity of his conviction for conspiracy to deliver, claiming that there was no factual basis for the charge. Brief of Appellant at 5. He argues that because his

[6] The State's citation is to the current version of the statute as it is not materially different from the version in effect on the day Bonds committed his crime. *See* Laws of 1998, ch. 260, § 2.

conviction was predicated upon facts that demonstrated he only committed the crime of simple possession, the conviction is invalid under *Blake. Id.* His claim fails because his guilty plea was authorized by law, and it was to a real crime that existed on the date of his offense. *See In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 718, 723, 10 P.3d 380 (2000) (plea agreements must be to existent crimes); *In re Pers. Restraint of Barr*, 102 Wn.2d 265, 269-70, 684 P.2d 712 (1984) (a plea does not become invalid because an accused chooses to plead to a related lesser charge that was not committed).

Bonds' plea was based on a real, constitutionally valid crime outside the scope of *Blake*. The Supreme Court in *Blake* held Washington's drug possession statute, RCW 69.50.4013(1), criminalized unintentional, unknowing possession of controlled substances in violation of state and federal due process clauses. *See Blake*, 197 Wn.2d at 186, 195. Washington State's simple possession statute did not require proof of a *mens rea* resulting in the criminalization of wholly innocent and passive

nonconduct. *Id*. at 193. *Blake* required that simple possession of drug convictions be vacated. *Id*. at 196.

Bonds' conviction for conspiracy to deliver a controlled substance is under different statutes, specifically RCW 69.50.407 and RCW 69.50.401(a)(1)(i).[7] While RCW 69.50.4013(1) did not require a *mens rea*, conspiracy to deliver has a *mens rea*, specifically intent to deliver. *See* RCW 69.50.407 and RCW 69.50.401(a)(1)(i); *Blake*, 197 Wn.2d at 183-96. This *mens rea* removes Bonds' conviction for conspiracy to deliver from *Blake*. *State v. Richter*, 24 Wn. App. 2d 920, 934, 521 P.3d 303 (2022) ("the *Blake* court's reasoning does not apply to this case or to former RCW 69.50.435(1) more generally"); *State v. Smith*, 65 Wn. App. 468, 473-74, 828 P.2d 654 (1992) (conspiracy to deliver a controlled substance requires proof that the defendant intended to assist co-conspirator in delivery).

[7] The State's citation is to the current version of the statute as it is not materially different from the version in effect on the day Bonds committed his crime. *See* Laws of 1998, ch. 290, § 2.

Accordingly, Bonds' prior conviction for conspiracy to deliver was properly included in his offender score.

2. Bonds' conviction for conspiracy to deliver is facially valid.

Prior convictions may only be omitted from an offender score when the defendant establishes, in the sentencing hearing, that the prior conviction was vacated in a separately litigated collateral attack or is constitutionally invalid on its face. *State v. Jones,* 110 Wn.2d 74, 77, 750 P.2d 620 (1988); *Ammons*, 105 Wn.2d 187. In this case, Bonds does not claim that his conspiracy to deliver conviction was vacated in a personal restraint petition or other collateral attack. Nor does he assert that the judgment and sentence of his conspiracy to deliver conviction was facially invalid. Bonds' failure to do so is fatal to his appeal.

The specific challenge that Bonds raises with respect to his conspiracy to deliver conviction, moreover, is not one that renders the conviction constitutionally invalid on its face. "Constitutionally invalid on its face" means a conviction which,

without further elaboration, evidence infirmities of a constitutional magnitude. *State v. Blair*, 191 Wn.2d. 155, 163, 421 P.3d 937 (2018). The judgment and sentence must evidence the invalidity without further elaboration. *In re Hemenway*, 147 Wn.2d 529, 532-33, 55 P.3d 615 (2002). When assessing the validity of the judgment and sentence, the court's consideration of plea documents is limited to whether the documents disclose invalidity in the judgment and sentence. *Id*.

In *Ammons*, one of the three appellants, Garrett, challenged the use of his prior guilty plea conviction to prove his criminal history because the State did not establish that constitutional safeguards were provided during the plea process. *Ammons*, 105 Wn.2d at 189. Garrett argued the guilty plea forms failed to show that he was aware of his right to remain silent, failed to set forth the elements of the crime of burglary, and failed to set forth the consequences of pleading guilty. *Id*. The court held that while this appellant may have a valid argument that his prior conviction was unconstitutional, such a determination

could not be made from the face of the guilty plea. This is because there was no indication that Garrett was told he did not have the right to remain silent. *Id.* Garrett, therefore, had to "pursue the usual channels for relief" before the conviction could be omitted from the offender score. *Id.*

Here Bonds, like Garrett, raises specific challenges to his conviction for conspiracy to deliver based on an alleged deficiency in the entry of his plea—namely that the plea rests on facts that only support a conviction under an unconstitutional crime. *See* Brief of Appellant at 4-5. While Bonds, like Garrett, may have a plausible argument that his prior conviction for conspiracy to deliver is unconstitutional, the challenge cannot be resolved from the face of the judgment and sentence.

The face of Bonds' judgment and sentence establishes that he was convicted of a real crime—conspiracy to deliver. *See* RCW 69.50.407; RCW 69.50.401(a)(1)(i); CP 157. The guilty plea documents support the constitutionality of the judgment and sentence as they demonstrate that Bonds knowingly,

intelligently, and voluntarily pled guilty to a crime for which there was no factual basis in order to take advantage of a plea offer. CP 175-76. Because the plea document, itself, does not disclose what crime Bonds thought he would be convicted of if the case went to trial, the merit of Bonds' challenge cannot be ascertained from the face of the documents.

Until and unless Bonds succeeds in obtaining an order vacating his conspiracy to deliver conviction in a collateral attack, its inclusion in his offender score was proper. *Jones*, 110 Wn.2d at 77; *Ammons*, 105 Wn.2d at 187. Bonds' request for a third sentencing hearing must be rejected.

3. A post-plea change in the law does not render Bonds' guilty plea to conspiracy to deliver involuntary.

Even assuming that a court could consider a collateral attack Bonds should now file thirteen years after his conspiracy to deliver conviction became final,[8] the petition would be

[8] Bonds' conspiracy to deliver conviction became final on March 20, 2000, the date it was filed with the clerk of the trial court. CP 157; RCW 10.73.090(3)(a).

rejected on the merits. Bonds' challenge to his guilty plea to conspiracy to deliver implicates the finding that the plea was knowingly entered. *See generally In re Pers. Restraint of Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998) (factual basis requirement imposed by court rule is a procedural method of ensuring that a defendant enters a plea with knowledge of the law in relation to the facts).

While the State is willing to accept that the impetus for Bonds' guilty plea to conspiracy to deliver was a desire for a sentence reduction from that associated with the charged crime,[9] a post-plea change in the law that renders the prior decision to plead guilty less attractive does not justify post-conviction relief. *See generally In re Pers. Restraint of Zamora*, 14 Wn. App. 2d 858, 867, 474 P.3d 1072 (2020) (defendant's guilty plea, tendered as a means of avoiding a death sentence, was not rendered involuntary by subsequent invalidation of the death

[9] *See* RCW 9.94A.595 (the standard range is reduced by 25 percent for conspiracy convictions).

penalty on constitutional grounds); *accord In re Pers. Restraint of Bybee*, 142 Wn. App. 260, 268, 175 P.3d 589 (2007) (a strategic miscalculation does not justify setting aside an otherwise valid guilty plea).

The trial court properly included Bonds' conviction for conspiracy to deliver in his offender score. His request for a remand for a third sentencing hearing must be denied.

B. Omitting Bonds' Conspiracy to Deliver from His Offender Score Does Not Change His Standard Range.

Where the standard sentence range is the same regardless of a recalculation of the offender score, any calculation error is harmless. *State v. Argo*, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996). Here, Bonds concedes that a recalculated score would not affect his standard sentencing range. *See* Brief of Appellant at 7. He nonetheless requests a remand to renew his request for a mitigated exceptional sentence. *Id.*

Bonds' request for a remand for a third sentencing hearing must be denied on two grounds. First, because Bonds' entire motion for *Blake* relief was time-barred, his request for a third

resentencing hearing is also time-barred. *Kelly*, 526 P.3d at 46. Second, a mitigated exceptional sentence for a person like Bonds, who committed their crime at age 36,[10] cannot be based upon post-crime conduct. *See generally State v. Law*, 154 Wn.2d 85, 101, 103, 110 P.3d 717 (2005) (post-crime adjustments and improvements will not support an exceptional sentence as they are unrelated to the crime or the defendant's culpability at the time of the offense). Bonds' appeal must be denied.

V. CONCLUSION

Bonds' prior conviction for conspiracy to deliver a controlled substance is facially valid and unaffected by *Blake*. The inclusion of this conviction in his offender score was legally sound. The removal of this conviction from Bonds' offender score does not alter his standard range. This Court, therefore, should deny Bonds' request for a third sentencing hearing.

[10] CP 2, 5.

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RESPECTFULLY SUBMITTED this 2nd day of May, 2023.

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5-2-23	*s/Therese Kahn*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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